Supreme Court, U.S.
FILED

(1)

No. 97-97 1062 DEC 19 1997

OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM 1997

MICHAEL A.-S. PARKER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Virginia

PETITION FOR A WRIT OF CERTIORARI

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116 pp

THE QUESTIONS PRESENTED FOR REVIEW

Is Virginia Code § 18.2-60.3, Virginia's "stalking" statute --- which provides that a person is guilty of stalking if he or she:

> . . . on more than one occasion engages in conduct directed at another person with the intent to place, or with the knowledge that the conduct places, that other person in reasonable fear of death, criminal assault, or bodily injury to that other person . . .
>
> ---

1. Unconstitutionally overbroad under the First Amendment because it fails to define the conduct proscribed, so that substantial innocent speech --- such as legitimate and desirable warnings of danger --- is criminalized by the statute?;

2. Unconstitutionally vague under the Fifth and Fourteenth Amendments, because it fails to define the conduct proscribed, because it does not give the citizenry fair notice of forbidden behavior, or because it invites enforcement in an arbitrary and discriminatory fashion?; and

3. Unconstitutional, under the First Amendment, as interpreted to convict in this case where the conduct complained of consisted solely of speech that was concededly nonthreatening and that was uttered in circumstances such that the accused was incapable of taking any physical action against the "victim", which the victim knew at the time of each and every act of speech charged?

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Parker v. Virginia, 24 Va. App. 692, 485 S.E.2d 692 (1997), (petition for appeal refused by the Supreme Court of Virginia on 23 September 1997).

JURISDICTION OF THIS COURT

The date of entry of the judgment of the Court of Appeals of Virginia sought to be reviewed was 13 May 1997. A petition for rehearing en banc to that Court was timely filed on 22 May 1997. Such petition for rehearing was denied on 20 June 1997. A petition for appeal to the Supreme Court of Virginia was timely filed on 11 July 1997. Such petition for appeal was refused by the Supreme Court of Virginia on 23 September 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV[1]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIRGINIA CODE ANNOTATED § 18.2-60.3, (IN FORM AS PERTINENT TO TO PARKER'S CONVICTION)[2]

A. Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of a Class 2 misdemeanor.

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[1] For the full text of this Amendment, including sections not pertinent to this appeal, see the Appendix.

[2] See footnote 3, post.

B. However, any person who is convicted of a first offense in violation of subsection A when, at the time of the offense, there was in effect any order prohibiting contact between the defendant and the victim or the victim's spouse or child, shall be guilty of a Class 1 misdemeanor.

C. A second conviction occurring within five years of a first conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be guilty of a Class I misdemeanor. A third or subsequent conviction occurring within five years of a conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

D. A person may be convicted under this section irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct described in subsection A occurred, if the person engaged in that conduct on at least one occasion in the jurisdiction where the person is tried.

E. Upon finding a person guilty under this section, the court shall, in addition to the sentence imposed, issue an order prohibiting contact between the defendant and the victim or the victim's spouse or child.

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: October 1997 to October 1998

MICHAEL A.-S. PARKER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

STATEMENT OF THE CASE[3]

The Petitioner, Michael A.-S. Parker, was charged with stalking in violation of § 18.2-60.3 of the Code of Virginia, as that statute was amended effective 1 July 1994.[4]

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[3] The specific content of the speech for which Parker was charged is taken from Exhibit 1 in the trial court. See Appendix, pp. A-57 - A-58. Otherwise, except as to the disposition of the case after conviction in the trial court and except as specific reference is otherwise made, the facts related herein are taken substantially verbatim from the Written Statement of Facts, Testimony and Other Incidents of Trial. Per Rule 5:11(c) of the Rules of Supreme Court of Virginia, such written statement was, after opportunity for objection by the prosecution, certified by the trial judge as an accurate and complete account of the proceedings at the trial level, in lieu of a transcript of such proceedings. The written statement is contained in full in the Appendix to this brief, at pages A-27 - A-30.

[4] For the full text of the statute under which Parker was convicted, see The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved in this Case, supra at xiv. This statute has subsequently been thrice amended, in ways that are not material to this appeal. The amendment effective July 1, 1995 added a subsection pertaining to warnings that must be given to the victim when a person convicted of stalking is released from prison. The amendment effective July 1, 1996 added a sentence to subsection D of the statute relating to evidentiary matters that are not here pertinent. The third amendment, effective July 1, 1997, which takes the statute to its present form, substituted the words "family or household member" for "spouse or child" in three places and added a subsection defining "family or household member". Except for this last change, which is not material for purposes of this appeal, the definition of the crime of stalking is exactly the same now as it was when Parker was convicted. For the full text of Virginia's stalking statute as effective July 1, 1995, see Appendix, pp. A- 36 - A-38. For the full text of Virginia's stalking law as effective July 1, 1996, see Appendix, pp. A-38 - A-40. For the full text of Virginia's current stalking law, see Appendix, pp. A-41 - A-43.

Specifically it was alleged that on or about 5 March 1995, to 8 March 1995, Parker did unlawfully engage in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury in violation of Virginia Code § 18.2-60.3, this being a third offense within five years.

Prior to trial Parker moved to dismiss the indictment on the grounds, inter alia, that the stalking statute under which Parker was charged was unconstitutionally overbroad, in violation of the First Amendment of the United States Constitution, and unconstitutionally vague, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. [See Appendix, pp. A-43 - A-50].[5] These

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[5] At the beginning of Parker's motion he said: "For the purposes of this argument, Parker concedes that the stalking statute as it is now written is on its face constitutional. However, later in the motion [Appendix, p. A-47], he asserted:

> If speech which presents no clear and present danger and which causes the person to whom it is directed to fear that the speaker will someday 'do something to me or my property,' is covered by the stalking statute then the statute is not only constitutionally overbroad because it restricts protected speech, but it is unconstitutionally vague. No one could ever have notice of what harmless comments or conduct might lead a listener to fear that the speaker would eventually do something, however slight, to her or her property.

[Appendix, p. A-49].

The trial court reached the question of facial unconstitutionality in this inclusive, if general, language: ". . . the Court heard the defendant's motion to dismiss the indictment at which time the Court overruled the motion on the issue of the stalking statute being unconstit-

grounds were reiterated in the trial court, first in the form of a motion to strike at the conclusion of the Commonwealth's evidence, again at the conclusion of all evidence, and finally after trial in a motion to set aside the verdict. [See Appendix, pp. A-51 - A-53 for pertinent portions of the motion to set aside] . The trial court denied the constitutional grounds of all these motions. [See Appendix, pp. A-22 - A-26].

The trial court granted Parker's pretrial motion to dismiss the charge of third offense stalking on the alternative grounds that Parker's alleged first conviction had been under a previous stalking law, written differently than the statute under which Parker was charged in the instant matter. Id. The trial court also partially granted Parker's motion to strike at the conclusion of the prosecution's evidence on the alternative ground that the prosecution failed to introduce any evidence of any prior conviction. [See Appendix, pp. A-23 - A-24, and A-28]. The charge ultimately in question was thus one of first offense stalking.

The evidence at trial was that the conduct charged

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utional . . ." [Appendix, p. A-23]. But if there were any doubt about the breadth of the challenge set up by Parker, the same was removed when the Court of Appeals of Virginia, on the clear Questions Presented as set forth at Appendix, pp. A-54 - A-55, and despite Rule 5A:18 of the Rules of the Supreme Court of Virginia, which would have permitted that court to ignore any questions not raised below, took up the gauntlet and explicitly decided the question of facial unconstitutionality. [Appendix, pp. A-7 - A-21].

And thereafter both of Parker's Petition for Rehearing in the Court of Appeals and his Assignments of Error in connection with his Petition for Appeal to the Supreme Court of Virginia continued his facial attack challenging the constitutionality of Virginia Code § 18.2-60.3 on the grounds of both overbreadth and vagueness.

consisted solely of speech in the form of telephone calls directed to Arnold by Parker from the cell block in which Parker was incarcerated when he made the calls. Over a period of about a week in March of 1995 approximately 30 collect calls to Arnold were attempted by someone in Parker's cell block. In seven of these calls, the caller spoke and his voice was recognized by Arnold as Parker's.

With respect to each call Arnold knew in advance, by means of caller-identification telephone equipment, that the call was from Parker's cell block and that it therefore might be he calling from jail, and this made Arnold feel "safe". In no case did Arnold answer the phone.[6] Instead, she listened to a short computer-generated message announcing a collect call, and an even shorter message related by the caller at the moment when the caller would ordinarily announce his name.[7]

The seven statements made by the incarcerated caller contained neither threats of violence nor indications that the caller would be making any physical contact with Arnold. The statements were of necessity very brief and sometimes occurred in succession. The calls were made on

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[6] The further evidence was that, although Arnold could have blocked the calls, she instead assisted the Commonwealth Attorney's efforts to mount a third offense felony case against Parker by monitoring and keeping a log of all calls to her from Parker's cell block. [See Appendix, pp. A-29 - A-30].

[7] The facts in this sentence are taken from the statement of facts in Appellant's opening brief before the Court of Appeals of Virginia [see Appendix, p. A-61], which, so far as the facts related in such sentence are concerned, was not contradicted in the statement of facts in the brief of the Commonwealth [see Appendix, pp. A-65 - A-66].

two separate days.[8] They included the following four statements made on 5 March 1995:

"O.k. Lets end it."
"It'll never end."
"You know you lied."
"I'll be out."

Three days later, on 8 March 1995, the following three statements were made:

"Don't be afraid."
"Please pick up."
"you hate me."

These were all the messages that were left, **and the trial court's written statement of the facts expressly ceded that "None of the messages in the calls contained a threat"** [Appendix, p. A-29]. The mere making of the calls, plus these messages, constituted the sum and substance of the "conduct" on which the conviction now sought to be reviewed was based.

At the conclusion of the trial the Court convicted Parker of first offense stalking and sentenced him confinement in jail for the term of six months.

Parker timely appealed to the Court of Appeals of Virginia, assigning as error the trial court's ruling on all constitutional issues, and specifically asserting that the

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[8] The text of the messages was contained in the Commonwealth's Exhibit 1 at trial, which is set forth in the Appendix, pp. A-57 - A-58.

stalking statute was unconstitutionally vague and overbroad on its face and as applied to convict Parker. [See Appendix, pp. A-54 - A-55]. The Court of Appeals upheld the Conviction, holding expressly that the stalking statute was not constitutionally overbroad or vague, on its face or as applied to convict in Parker's case.[9] [See Appendix, pp. A-7 - A-21 for the opinion of such court].

Parker timely filed a petition for rehearing en banc by the Court of Appeals, incorporating by reference the whole of his previous brief and thus again preserving all constitutional error previously asserted. [See Appendix, pp. A-67 - A-71 for pertinent portions of the petition for rehearing en banc]. Upon denial of such petition [see Appendix, pp. A-33 - A-34], Parker timely petitioned for appeal to the Supreme Court of Virginia, assigning error to the decision of the Court of Appeals on all constitutional issues. [See Appendix, pp. A-54 - A-55 for pertinent portions of the petition for appeal to the Supreme Court of

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[9] Although beyond the scope of this appeal, it should be noted that the Court of Appeals in upholding the trial court on the issue of legal sufficiency of the evidence looked beyond the evidence presented at trial in at least three important respects. First, in finding that Arnold's fear was "reasonable", the Court considered Parker's previous convictions for stalking, which were part of the record below only by virtue of the pretrial motions, and not because of any evidence admitted at trial. Second, there was nothing in the record to support the court's inference that what fear Arnold may have felt was of "death, criminal sexual assault, or bodily injury". Third, there is no support in the record for the court's implication that Parker's calls heightened Arnold's fear. To the contrary, the evidence certified by the trial court was that the calls were not threatening and that Arnold's fear was the same both before and after the calls. See Parker's petition for rehearing, Appendix, pp. A-67 - A-71.

Virginia]. By order of 23 September 1997 [see Appendix, pp. A-32 - A-33], the Supreme Court of Virginia refused to review the decision of the Court of Appeals of Virginia, giving rise to the instant petition for certiorari to the judgment of the Court of Appeals of Virginia.

ARGUMENT

I. INTRODUCTION

Under § 18.2-60.3 of the Virginia Code Annotated, which in pertinent part reads the same now as it did at the time of Parker's conviction[10], a person is guilty of stalking if he or she:

> . . . on more than one occasion engages in conduct directed at another person with the intent to place, or with the knowledge that the conduct places, that other person in reasonable fear of death, criminal assault, or bodily injury to that other person or to that other person's family or household member
> . . .

There are two prongs to this statute, the "intent" prong and the "result" prong. A person violates the intent

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[10] The only change to the quoted subsection is that the 1997 amendments to the statute substituted the words "family or household member" for the words "spouse or child" in the 1994 statute. See footnote 3, supra. This change is not material to any issue sought to be appealed.

prong of the stalking statute when he intends by repeated conduct to place a person in fear of the specified sort. A person violates the result prong of the statute when his repeated conduct places the other person in reasonable actual fear of the specified sort.

The following scenarios all constitute violations of both prongs of the stalking statute:

1. A physician diagnoses a ruptured appendix and advises his patient that she must undergo surgery or she will die. The physician subsequently learns that the patient has not sought surgery and again inveighs her to do so or risk death. On the second such contact the patient is convinced that her life is truly at risk.

2. During a conflagration in a hotel a fireman runs down the hall knocking on doors and shouting that the building is burning down and occupants must get out or be burned to death. When he gets to the end of the hall he turns around and repeats the process. There are numerous people who hear these warnings and are convinced they are indeed in danger of their lives.

3. A distraught mentally disturbed patient flees from his psychiatrist's office waving a gun and screaming that he is going to kill his ex-girlfriend. The psychiatrist, performing his duty to warn, twice calls the ex-girlfriend to advise her of her predicament and to compel her to seek a place of safety. On the second such call she is convinced.

4. A federal prosecutor tries on repeated occasions to convince a key witness in a case involving a drug kingpin that his life is in danger. Not being certain that he has persuaded the witness of the danger, the prosecutor assigns a federal marshall to follow the witness for the dual purpose of protecting the witness and convincing him that he is at risk for his life. The marshall follows the witness wherever he goes. The witness is convinced by both the words of the prosecutor and the acts of the marshall that his life is indeed in danger.

5. A woman who has been stalked for some time receives a call from her stalker saying "The time has finally come. Sometime soon I am going to kill you." The woman replies that if she sees him on her property she will kill him. When he shows up on her doorstep two days later she meets at the door with her shotgun in hand. She tells him again that she is going to kill him. He believes her.

6. A teacher with a misbehaving student tells the student that if he doesn't behave she will spank him. The student believes the teacher and behaves accordingly. An hour later the student lapses into the same behavior with the same result. On two subsequent occasions of such misbehavior the teacher calls the student's mother and warns the mother that the child will be spanked if his behavior does not improve.

7. A person protesting a local zoning action that would permit construction of a toxic waste disposal facility near her home, urges her neighbors to oppose such action, asserting (as she believes to be true) that the

containment system of the facility is inadequate and that the facility will thus cause death, disease or injury to persons living in the neighborhood. She is believed by several of her neighbors upon presentation of evidence that the same system has failed in three other localities with disastrous results.

In each of these scenarios there is conduct directed at another person on more than one occasion, with the intent to place that other person in fear of death or bodily injury to that person or that person's family member. And in each case there is engendered a reasonable actual fear of death or bodily injury. There is thus in each scenario a technical violation of both prongs of the Virginia stalking statute. The fireman has committed numerous violations. In the scenario of the federal witness there is a violation by both the prosecutor and the federal marshall. The teacher has stalked both the child and the parent.

Because Virginia's stalking statute does not define the conduct it proscribes, it reaches a substantial amount of speech that should clearly be protected under the First Amendment and is thus facially unconstitutionally overbroad.

Because Virginia's stalking statute fails to define the conduct proscribed, it does not give the citizenry fair notice of what behavior it forbids and invites enforcement in an arbitrary and discriminatory fashion. The statute is thus facially unconstitutionally vague under the Fifth and Fourteenth Amendments.

Virginia's stalking statute is also unconstitutional as interpreted to convict Parker. Parker's conviction was for pure speech that was concededly nonthreatening and that was

uttered at a time when Parker was incarcerated and could not have committed any physical act against the "victim", and the victim knew this. Virginia has no significant interest in forbidding speech of this nature.

II. PARKER HAS STANDING TO ATTACK THE FACIAL CONSTITUTIONALITY OF VIRGINIA'S STALKING STATUTE ON THE GROUNDS OF OVERBREADTH UNDER THE FIRST AMENDMENT AND VAGUENESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others. Massachussets v. Oakes, 491 U.S. 576, 581 (1989); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-504 (1985); Thornhill v. Alabama, 310 U.S. 88, 98 (1940). The departure from the general rule is predicated on the judicial assumption that the existence of an overly broad statute might cause persons not before the court to refrain from constitutionally protected expression, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973), and on the policy rationale that " . . . the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." Bates v. State Bar, 433 U.S. 350, 380 (1977).

On a similar rationale, a defendant also has standing to facially attack a statute on due process grounds of vagueness, even though his own conduct might be unprotected. Kolender v. Lawson, 461 U.S. 352, 357-359 (1983). See also Secretary of State of Maryland v. Joseph H. Munson, 467 U.S. 947, 965 n. 13 (1984) (recognizing facial challeng-

es although the litigant's conduct may be legitimately proscribed).

Parker thus has standing to facially attack the Virginia stalking statute, even if, as is denied, the application of the statute to his particular conduct were constitutional.

III. VIRGINIA'S STALKING STATUTE IS UNCONSTITUTIONALLY OVERBROAD AND VIOLATIVE OF THE FIRST AMENDMENT BECAUSE IT FAILS TO DEFINE THE CONDUCT PROSCRIBED, SO THAT SUBSTANTIAL INNOCENT, AND EVEN DESIRABLE, SPEECH IS CRIMINALIZED BY THE STATUTE.

In pertinent part the stalking statute under which Parker was convicted read as follows:

> A. Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of a Class 2 misdemeanor.

§ 18.2-60.3, Virginia Code Annotated.

Because there is nothing in this statute to limit its application to conduct other than speech (as witness this case), and because no narrowing construction has been or could properly be offered by the appellate courts of Virginia, the statute reaches speech and is consequently subject to First Amendment scrutiny. See Houston v. Hill, 482 U.S. 451,

458-460 (1987) (Court struck down criminal statute encompassing verbal as well as physical conduct); Texas v. Johnson, 491 U.S. 397 (1989) (Statute reaching expressive conduct other than speech also subject to facial attack).

The First Amendment to the United States Constitution generally prevents government from "abridging the freedom of speech". Virginia's stalking statute is overbroad and should be struck down because it reaches a substantial amount of speech protected by the First Amendment. One scholar has summarized the overbreadth doctrine thus:

> [w]hen speech or expressive activity forms a significant part of a law's target, the law is subject to facial challenge and invalidation if: (i) it is "substantially overbroad" --- that is, if its illegitimate applications are too numerous "judged in relation to the statutes plainly legitimate sweep," and (ii) no constitutionally adequate narrowing construction suggests itself.

Richard A. Fallon, Making Sense of Overbreadth, 100 Yale Law Journal 853, 863 (1991). Moreover, criminal statutes must be scrutinized with particular care when challenged for overbreadth because the consequences of imprecision are so great. See Winter v. New York, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses [relating to expression] is higher than in those depending primarily upon civil sanction for enforcement"); Hoffman Estates v. Flip-side, Hoffman Estates, 455 U.S. 489, 498-499 (1982) ("The Court has expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

These general principles govern all issues of First Amendment overbreadth. But different specific standards apply depending on whether the statute in issue is content-neutral or content-based. The Virginia Stalking statute is likely a content-neutral statute because it prohibits all speech uttered with a particular intent or having a particular result.[11] See Frisby v. Schulz, 487 U.S. 474, 481-482

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[11] See Thomas J. Nehilla, Applying Stalking Statutes to Groups --- A First Amendment Freedom of Speech Analysis, 899 Dickenson Law Rev., 1071, 1078 (1995). Nehilla contends that most stalking statutes are content-neutral. But it may well be that the Virginia statute is content-based because it is aimed at a particular type of speech --- speech intended to incite fear --- so that the statute is directed at speech with a particular communicative impact. See generally: U.S. v. Lee, 5 F.3d. 1297 (8th Cir. 1993) (examining a conspiracy act which relied on communicative impact of speech and thus required court to look at the content of the speech implicated); Dorman v. Satti, 862 F.2d. 432, 437 (2d Cir. 1988) (court considered that a harassment act which prohibited all speech intended to have the effect of discouraging hunters from engaging in their avocation might be content-based despite the statute's putative application to all speech).

But, whether the Virginia stalking statute is considered as content-neutral or content-based, the statute is still overbroad. If the statute were considered content-based, then all of the speech proscribed by the statute would either have to fit into one of the recognized exceptions to First Amendment protection, or withstand strict scrutiny. The recognized exceptions are for: (1) incitement of riot (i.e., words creating a clear and present danger); (2) fighting words; (3) obscenity; and (4) libel. Because the statute proscribes speech that is merely intended to produce fear of a specified sort, and because it is easy to imagine speech that is intended to produce fear of the proper sort but that does not fit any of the exceptions, the statute does not fit within the exceptions. It would therefore be subject to strict scrutiny, i.e. the State would have to have a compelling interest for enactment of the statute and the statute would have to be narrowly drawn to achieve that end. As will be seen in the argument above, if the statute is content-neutral, it must

(1988).

In order to be valid a content-neutral regulation of speech Virginia's stalking statute must : (i) further a significant State interest, Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S 37, 45 (1983); and (ii) be narrowly tailored to serve that significant State interest, Frisby, supra, at 479-480.

Virginia doubtless has a significant interest in proscribing some of the conduct that is touched by its stalking statute. No one would question that obsessive threatening behavior of the sort that is so often a precursor to sexual assault or murder is a serious problem.[12] But forbidding such behavior is a daunting legislative task[13] for three reasons. First, stalking legislation is interdictory in nature; it is designed to stop obsessive and threatening behavior before it escalates to physical violence. Yet it is difficult to determine where in the continuum from innocent speech to physical violence the State's interest in proscribing

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serve a significant state interest and be narrowly tailored to do no more. Because the primary problem with the statute is that it is not narrowly circumscribed --- whether the pertinent state interest must be a compelling one or merely a significant one --- it does not matter whether the statute is content-neutral or content-based.

[12] See: Robert A. Guy, The Nature and Constitutionality of Stalking Laws, 46 Vanderbilt Law Review 991, 994 et seq. (1993); Silvija A. Strikis, Stopping Stalking, 81 Georgetown Law Review 2771, 2771-2775 (1993).

[13] See Robert P. Faulkner and Douglas H. Hsaio, And Where You Go I'll Follow: The Constitutionality of Proposed Stalking Legislation, 31:1 Harvard Journal on Legislation, pp. 1 - 62 (1994).

the behavior becomes significant.[14] Second, the term "stalking" is a catch-all phrase that describes a multitude of behaviors rather than any specific act. A wide range of expressive behavior and physical acts, or a combination of the two, may fairly be described as "stalking" and, though we may know it when we see it in specific cases, "stalking" is very difficult to define in the general case. The third problem is that a communication or act that would be utterly innocent in one context can be quite threatening in another. A father might well be pleased to receive a letter from the son of an old friend stating that the author would very much like to meet his daughter, whereas the same letter from a Jeffrey Dahlmer type would ruin just about any father's day. It is difficult to articulate the distinction between the State's interest in forbidding the Dahlmer letter (if any it has), but not the other.

Fortunately, we are not faced on this appeal with the difficult question of deciding exactly at what points on the continuums of interdiction and increasingly threatening acts the State's interest arises. It is enough to say that the State has no significant interest in proscribing the conduct raised by the hypotheticals or by the facts of this case.

The primary problem with Virginia's stalking statute is that the statute is not narrowly tailored to serve whatever

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[14] Addressing the constitutionality of a prior and very different stalking statute than the one under which Parker was convicted in the instant case, the Virginia Court of Appeals concluded that the legislature's intent was to stop serious and harassing behavior before it escalated into violence. Woolfolk v. Commonwealth, 18 Va. App. 840, 447 S.E.2d. 530 (1995). In deciding the instant case, the court never explicitly addressed the issue of what state interest the stalking statute serves.

interest the State does have in prohibiting stalking behavior.[15] A statute is considered narrowly tailored if it eliminates no more than the precise source of the "evil" it seeks to remedy. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-810 (1984). Virginia's stalking statute is overbroad because it fails to define the "conduct" that is proscribed. Such conduct is not limited to acts of physical violence or even more constitutionally intractable ills such as threats, harassment or intimidation. **Mere intent to induce fear of bodily injury, however slight, by a twice repeated act of pure speech, will constitute a violation of the statute.**[16] The Virginia General Assembly, in attempt-

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[15] Virginia's stalking statute has been decried by at least two authorities as one of the worst in the nation, and one of the most likely to be invalidated on grounds of facial overbreadth and vagueness, for two reasons: (1) the statute's lack of definition of the conduct proscribed; (2) its emphasis on the victim's reaction to contextually define the behavior proscribed. M. Katherine Boychuk, Are Stalking Laws Vague or Overbroad, 88 Northwestern Law Review 769, 801 (1994); and Robert N. Miller, Stalk Talk: A First Look at Antistalking Legislation, 50 Washington and Lee Law Review 1303, 1324 (1993).

[16] In an opinion that received favorable critical attention nationally, a Virginia general district trial court held that a previous version of the Virginia stalking statute was unconstitutional, commenting:

> While it may seem absurd, a close reading of the Virginia statute would make an [sic.] it a crime for a person in Saltville to use voodoo dolls to place a curse of death on someone in Virginia Beach. It would violate the statute as drawn.

Commonwealth v. Camper, No. 93-2876 (Va. Gen. Dist. of Richmond, April 9, 1993). Although this opinion was overruled by Woolfolk v. Commonwealth, supra in footnote 14, the example is apposite to the current statute. If the dolls were twice pierced with mere intent to cause injury or death, however incredible and ineffective such intent might be, the present stalking statute has been violated.

ing to include within the ambit of the statute the full range of activities that might come under the umbrella of "stalking", has made the statute overinclusive. It would seem that Virginia would attempt to draw the line at behavior that amounts to assault or attempted assault, but --- whatever the value of that line as a policy judgment concerning what behavior should be forbidden --- the statute fails as not properly circumscribed to reach only such behavior. The examples set forth above are perhaps the most dramatic illustrations of the overbreadth: Virginia's stalking statute, in criminalizing innocent speech that amounts to warnings of danger, reaches a substantial amount of speech that is not only protected by the First Amendment and but that is also highly desirable from society's standpoint.

And the statute cannot be saved by a constitutionally adequate narrowing construction. The problem pointed to by the examples is that the statute criminalizes conduct that puts persons in fear for legitimate as well as illegitimate purposes. This problem with the statute could perhaps be remedied if the statute were merely amended to read " . . . on more than one occasion engages, **without justification,** in conduct . . . "[17]

But this could not be done by curative construction in this Court for two reasons. First, this Court lacks jurisdiction to authoritatively construe state statutes. U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); Gooding v. Wilson, 405 U.S. 518, 520 (1972). Any narrowing construction would therefore have to be undertak-

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[17] But this is not to say that the statute could be made constitutional by this amendment. The statute would still likely be unconstitutionally vague and would still likely reach speech that is protected by the First Amendment.

en by the appellate courts of Virginia. The Virginia Court of Appeals has declined the opportunity presented by this case to narrow the unconstitutional reach of the statute[18] (assuming that court could properly have done so, which is denied for reasons shortly to be argued). Likewise, the Supreme Court of Virginia has passed its opportunity to do so by refusing review in this case of the decision of the Court of Appeals.

But second, and more important, the statute is not readily susceptible to any narrowing construction. The words in a statute are presumed to have their common meaning. Perrin v. U.S., 444 U.S. 37, 42 (1979). The import of the Virginia stalking statute is clear and unambiguous; it unquestionably proscribes the conduct described in the examples, and the Virginia appellate courts could not properly narrow the statute --- even by the proffered cure --- without in effect rewriting the statute. In these circumstances, it is this Court's plain duty to decide the constitutional claim. Houston v. Hill, supra, at 468-469; Dobrowski v. Pfister, 380 U.S. 479, 489-490 (1965); Bellotti v. Baird, 428 U.S 132, 148 (1976).

Virginia's stalking statute is overbroad because it criminalizes a substantial amount of speech that is protected

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[18] In Woolfolk v. Commonwealth, supra in footnote 14, the Court of Appeals upheld the constitutionality of a previous and very different version of the stalking statute by narrowing its application to conduct with no legitimate purpose. Regardless of the propriety of that constitutionally suspect approach in Woolfolk, the court attempted no such narrowing with respect to the present statute. See, moreover, Makarov v. Virginia, 217 Va. 381, 228 S.E.2d 573 (1976), in which the Supreme Court of Virginia refused to narrow a statute so as to be constitutional where the language that was unconstitutional was plain.

by the First Amendment, and the statute cannot be cured by any obvious narrowing construction.

IV. VIRGINIA'S STALKING STATUTE IS UNCONSTITUTIONALLY VAGUE AND VIOLATIVE OF THE FOURTEENTH AMENDMENT BECAUSE IT FAILS TO PROVIDE THE CITIZENRY FAIR NOTICE OF FORBIDDEN BEHAVIOR AND INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

The Fifth and Fourteenth Amendments require that the government articulate its aims with a reasonable degree of clarity to assure ". . . that State power will be exercised on behalf of policies reflecting an authoritative choice among competing social values, reduc[ing] the danger of caprice and discrimination in the administration of the laws, enabl[ing] individuals to conform their conduct to the requirements of law, and permit[ing] meaningful judicial review." Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984). A law that does not do so is unconstitutionally vague. Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

The doctrine of unconstitutional vagueness is perhaps best delineated in Grayned v. City of Rockford, 408 U.S. 104, 108 (1972):

> It is a basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accord-

> ingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of forbidden areas were clearly marked.

quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Virginia's stalking statute offends all three of the values mentioned. The hypotheticals set forth above are all cases in which the speaker would have little reason to believe that he or she was committing a crime.[19] On the

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[19] An informal survey has shown that five Virginia lawyers did not know that the following factual scenario constituted any crime in Virginia, much less what crime:

> Your client in a messy divorce case snaps and tells you "If I'm going to lose everything, then I'm going to kill my wife's attorney". The client brandishes a gun and leaves in a very agitated state. You, believing that he seriously intends death or harm to the other attorney, telephone that attorney and warn him. The other attorney discounts the warning. You call back again and this time convince the other attorney of the

hypotheticals alone, the statute fails to give proper notice of what is forbidden and is therefore unconstitutionally vague. See Papachristou v. City of Jackonsville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids.")

But the mischief does not stop with the hypotheticals, for the statute also provides little guidance as to what sort of speech will constitute a violation in ways that are not addressed by the hypotheticals. Does the statute proscribe conduct that is intended to, or actually reasonably does, instill fear on conditional terms: "I will hurt you, if . . . "? Does the statute proscribe statements made with intent to cause fear, which, however sincerely intended, pose no credible threat, as where a prisoner serving a twenty year term writes the prosecutor that convicted him, threatening harm to him when he gets out? Does the statute apply to subjunctive threats: "the people that passed this ordinance should be shot!"? Virginia's stalking statute is unconstitutional both because it reaches conduct that no person of average intelligence would consider stalking behavior, and because the statute provides little guidance as to what behavior --- even behavior that is likely within the intendment of the statute --- is proscribed by the statute.

Aside from its failure to provide the citizenry with guidance of what is proscribed, Virginia's stalking statute

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danger wherein you believe him to be.

All the attorneys were astonished that their hypothetical actions could be charged as stalking under Virginia Code § 18.2-60.3.

also invites arbitrary and discriminatory enforcement because it fails to distinguish unlawful conduct from lawful conduct by more than the discretion of the officer placing the charge. See Kohlender, supra, at 351-352. Although the statute may never be applied to prosecute the cases set forth in the hypotheticals, it could be so applied, and the statute thus vests too much discretion in the persons responsible for law enforcement. Moreover, it is very easy to conceive applications of the statute that are not as extreme as the hypotheticals, but that nonetheless go beyond the likely intended use of the statute. For instance, the statute could easily be applied as a tag-on charge in cases of repeated assault or battery, or in cases of child abuse. Additionally, because stalking subsumes many other crimes and because third offense "stalking" is a felony in Virginia, there may be cases where prosecutors would prefer a stalking charge to a more appropriate charge as a means of parlaying what would otherwise be a misdemeanor into a felony.

Finally, Virginia's stalking statute should be held to be unconstitutionally vague because it touches upon First Amendment freedoms and will operate to inhibit the exercise of [those] freedoms "by those who believe the written law means what it says." Baggett v. Bullitt, supra, at 375. As the hypotheticals show, and as the argument with respect to overbreadth indicates, innocent speech that is protected by the First Amendment and that is highly desirable from the standpoint of society is proscribed by this statute. Persons uttering such speech should not do so at peril of conviction for stalking, however unrealistic that peril is. As the quote from Grayned indicates: Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of forbidden areas were clearly marked." Who could blame the psychiatrist or the fireman for not uttering a needful warning when to do so would subject him to the

caprice of a prosecutor?

V. VIRGINIA'S STALKING STATUTE IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE AS INTERPRETED TO CONVICT IN THIS CASE WHERE THE CONDUCT COMPLAINED OF CONSISTED SOLELY OF SPEECH THAT WAS CONCEDEDLY NONTHREATENING AND THAT WAS UTTERED OVER THE TELEPHONE AT TIMES WHEN THE ACCUSED WAS INCARCERATED AND THE VICTIM KNEW HIM TO BE INCARCERATED.

The foregoing argument has been perhaps more hypothetical than it need be, for the facts of this case are a sufficient indication of the constitutional overbreadth and vagueness of Virginia's stalking statute as interpreted by the appellate courts of Virginia. In this case Parker made seven brief statements:

"O.k. Lets end it."
"It'll never end."
"I'll be out."
"Don't be afraid."
"Please pick up.";
"You hate me."; and
"You know you lied."

Nothing in the content of any of these statements would go beyond the protection of the First Amendment in the absence of some subtextual consideration that would justify abridgment of that protection. But where is that consideration to be found? The statements were concededly nonthreatening. They were made at a time Parker when was incarcerated and Arnold knew that he was incarcerated. And none of the statements increased Arnold's fear of Parker. In

fact they made her feel safe because they reassured her that Parker was in jail [Appendix, pp. A-28 - A-29]. In these circumstances none of the statements go beyond the protection of the First Amendment.

Because Parker's speech does not constitute fighting words, obscenity, libel (necessarily), or incitement to riot, the State must have a significant interest (if the statute is content-neutral), or a compelling interest (if the statute is content-based) as a threshold to prohibition of the speech. But no legitimate interest is served by a proscription of the speech that Parker uttered in this case. The statements themselves are innocuous and are of the sort that are uttered completely innocently thousands of times daily in Virginia, and neither Parker nor the citizenry at large could reasonably be expected to know that the speech might be criminal. Persons who utter such speech doubtless do so in confidence that the speech is protected by the First Amendment, and in ignorance that they might be violating Virginia's stalking statute.

VI. SUMMARY

Both the hypothetical cases argued above and the facts of this case show that Virginia's stalking statute is unconstitutionally overbroad in violation of the First Amendment and unconstitutionally vague in violation of the Fifth and Fourteenth Amendments. In attempting to set the "stalking" line too far back on the continuum from innocent speech to physical violence the Virginia Court of Appeals has thrown the baby out with the bathwater. The decision of the Virginia appellate courts should be overturned and Virginia's stalking statute should be declared facially unconstitutional; and the fact that Parker's conduct may have

been reprehensible, and such as Virginia might wish to criminalize, does not permit the State to do so by means of a statute which cannot pass constitutional muster.

CONCLUSION

For the foregoing reasons, the Petitioner Michael A.-S. Parker prays that in this case certiorari issue to the judgment of the Court of Appeals of Virginia, and that in due course such judgment be reversed, with costs in this Court to be assessed in favor of Parker.

Respectfully submitted,

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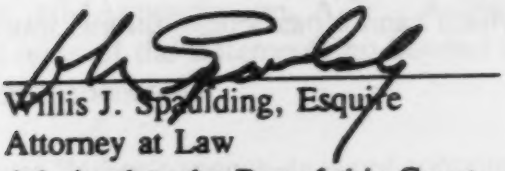

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Michael A.-S. Parker

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: October 1997 to October 1998

MICHAEL A.-S. PARKER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

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APPENDIX

I. The opinions, orders, findings of fact, and conclusions of law entered in conjunction with the judgment sought to be reviewed:

Mandate of the Court of Appeals

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA ON TUESDAY THE 13TH DAY OF MAY, 1997.

Michael A. S. Parker, Appellant,

against Record No. 2124-95-2
Circuit Court No. 10,806

Commonwealth of Virginia, Appellee.

From the Circuit Court of Albemarle County Before Judges Benton, Elder and Senior Judge Cole

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

It is ordered that the trial court allow Willis J.

Spaulding, Esquire, court-appointed counsel for the appellant, a total fee of $400 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

The Commmonwealth shall recover of the appellant the amount paid said court-appointed counsel to represent him in this proceeding, counsel's costs and necessary direct out-of-pocket expenses; and the fees and costs to be assessed by the clerk of this Court and the clerk of the trial court.

This order shall be certified to the trial court.

Costs due the Commonwealth by appellant in Court of Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

****

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Elder, and Senior Judge Cole

Argued at Richmond, Virginia

MICHAEL A. S. PARKER

v. Record No. 2124-95-2

COMMONWEALTH OF VIRGINIA

OPINION BY JUDGE LARRY G. ELDER
MAY 13, 1997

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY

Paul M. Peatross, Jr., Judge

Willis J. Spaulding; Leslie Lee Robinson for appellant.

Margaret Ann B. Walker, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief) for appellee.

Michael A. S. Parker (appellant) appeals his conviction of stalking in violation of Code § 18.2-60.3. Appellant contends that the evidence was insufficient to support his conviction. In the alternative, he contends that the stalking statute is unconstitutionally vague and overbroad. For the reasons that follow, we affirm.

I.

FACTS

Appellant was convicted of first offense stalking in violation of Code § 18.2-60.3. The evidence at trial, viewed in the light most favorable to the Commonwealth, was that appellant and the victim had been involved in a relationship since 1989 that was marked by many breakups and reconciliations. The victim testified that the relationship was "abusive," and she was in

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constant fear during the relationship. The record, which consists of a written statement of facts and the exhibits introduced at trial, provides no detail regarding the extent and nature of abuse inflicted by appellant on the victim or whether the relationship was still ongoing. The record does establish that appellant was convicted of stalking the victim in 1994 under a prior version of Code § 18.2-60.3. At that time, appellant was convicted on an arrest warrant that charged him of "[o]n more than one occasion, engag[ing] in conduct with the intent to cause emotional distress to [the

victim] by placing that person in reasonable fear of death or bodily injury." The trial court checked the box on the reverse side of the arrest warrant stating that appellant was found "guilty as charged."

In early March, 1995, appellant was incarcerated in jail. On March 2, the Commonwealth's attorney notified the victim that appellant's tentative release date from jail was May 16, 1995 and advised her to document all contact with appellant. The victim obtained a caller identification device and learned the number of the only phone in the jail to which appellant had access.

On May 5, 8, 10, and 11, respectively, the victim received a barrage of phone calls that the caller identification device indicated were made from the phone in appellant's cell block. Most of the calls ended when the caller hung up without speaking. However, appellant did briefly speak during seven of the phone calls. The victim never spoke during any of the calls.

On March 5, the victim received telephone calls from appellant's cell block at 8:05, 8:10, 8:55, 8:57, 9:01, 9:04, 9:06, 9:11, 9:12; 9:14, and 9:17, respectively. During the 9:01 call, the appellant said, "Okay, let's end it." During the 9:11 call, the appellant said, "It will never end." During the 9:12 call, appellant said, "You know you lied." During the 9:17 call, appellant told the victim, "I'll be out."

On March 8, the victim received telephone calls from appellant's cell block at 3:54, 4:00, 4:02, 4:06, 4:28, 4:42, and 4:50 and 5:03, respectively. During the 4:42 call, appellant said, "Don't be afraid." During the 4:50 call, he said, "Please pick up." During the 5:03 call, he said, "You hate me."

On March 10, the victim received more telephone calls from appellant's cell block at 8:26, 8:42, 8:45, 8:46, and 8:47, respectively. On March 11, the victim received calls at 11:51, 2:35, 4:11, 4:18, and 4:23, respectively. Appellant did not speak during any of these calls. The victim testified that appellant's calls made her fearful.

At the conclusion of the Commonwealth's evidence and again at the conclusion of his case, appellant moved to strike on the grounds that the evidence was insufficient and that the stalking statute was unconstitutionally vague and overbroad as it applied to him. The trial court denied appellant's motions and convicted him of stalking. Appellant then made a motion to set aside the verdict on these same grounds, which the trial court also denied.

II.

SUFFICIENCY OF THE EVIDENCE

Appellant contends that the evidence fails to prove that

he violated Code § 18.2-60.3. We disagree.

Under Code § 18.2-60.3, a person is guilty of stalking if the Commonwealth proves that he or she:

> on more than one occasion engages in conduct directed at another person with the intent to place, or with the knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child . . . .

In order to obtain a conviction under Code § 18.2-60.3, the Commonwealth must prove three elements. First the Commonwealth must prove the defendant engaged in multiple instances of conduct directed at a person or that person's spouse or child. Second, the Commonwealth must prove that this conduct caused that person or their spouse or child to experience reasonable fear of death, criminal sexual assault, or bodily injury. Third, the Commonwealth must prove that the defendant either intended to cause this fear or knew that it would result from his or her conduct.

When considering the sufficiency of the evidence on appeal, "we view the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). So viewed, the record proved beyond a reasonable

doubt that appellant engaged in repeated

conduct directed at the victim. The record indicates that the victim received telephone calls eleven times in rapid succession on March 5, 1995. During four of these calls the appellant made four single-sentence comments, which included: "Okay, let's end it"; "It will never end"; "You know you lied"; and "I'll be out." Upon this proof, the trier of fact could have inferred beyond a reasonable doubt that appellant either made all of the calls or instigated others to make the calls in which no person spoke. The same inferences arise from the eight calls on March 8, when appellant made three comments, including: "Don't be afraid"; "Please pick up"; and "You hate me." Finally, the same inferences arise from the five calls on March 10, and the five calls on March 11.

The evidence also proved beyond a reasonable doubt that the victim was placed in reasonable fear of bodily injury by this conduct. First, the victim testified that these calls made her fearful. Although the victim did not specify that she was afraid for her physical well-being, the evidence in the record of the dynamics of her relationship with appellant supplied the necessary context for the trial court to conclude that she reasonably feared bodily injury or one of the other evils listed in Code § 18.2-60.3. The victim testified that her relationship was "abusive." In addition, the evidence of appellant's prior conviction established that on at least one other occasion, appellant had engaged in conduct that made

the victim reasonably fear for her physical safety. Against this background, the

victim was subjected to a barrage of unwelcome phone calls that included a reference to appellant's impending release date from jail and the never-ending nature of his relationship with the victim. Based on these facts, we cannot say that the trial court lacked evidentiary support to conclude that appellant's conduct caused the victim to experience a reasonable fear of bodily harm.

Finally, evidence proved beyond a reasonable doubt that appellant knew that his jail cell phone calls would place the victim in fear of bodily harm. Appellant was a party to the relationship described by the victim as "abusive." In addition, he was aware from his previous stalking conviction that his conduct in the past had caused the victim to reasonably fear physical violence by him. Finally, the victim's silent demeanor on the phone immediately indicated to appellant that his phone calls were not welcome. Appellant acknowledged that he was causing the victim to experience fear on March 8 when he said, "Don't be afraid." Thus, the trial court had a factual basis to conclude that appellant knew that his continued barrage of phone calls would be interpreted by the victim as indicative of an impending physical threat. We hold that the evidence was sufficient to prove that appellant stalked the victim in

violation of Code § 18.2-60.3.

III.

CONSTITUTIONALITY OF CODE § 18.2-60.3

Appellant contends that Code 18.2-60.3 is unconstitutionally vague and overbroad, both on its face and as applied to him. We disagree.

"In assessing the constitutionality of a statute, we must presume that the legislative action is valid. The burden is on the challenger to prove the alleged constitutional defect." Perkins v. Commonwealth, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991).

A.

Appellant asserts that Code § 18.2-60.3 is unconstitutionally vague because it does not adequately inform ordinary citizens of what actions are proscribed as stalking. Appellant's attack of the stalking statute appears aimed at the "reasonable fear" element of the crime. He argues the statute is vague because it proscribes a limitless range of conduct, including speech, that is not actually threatening to the victim but is deemed illegal because of the victim's purely subjective fears. He argues that the statute is vague as applied to him because, as an incarcerated citizen

who had no opportunity to harm the victim, he could not possibly have known that his conduct would subject him to prosecution under Code § 18.2-60.3. We disagree.

A penal statute is unconstitutionally void-for-vagueness if it does not "define the criminal offense with sufficient

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definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolendar v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

> This doctrine protects two due process interests. First, it requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Second, it prevents arbitrary and discriminatory enforcement by requiring that "laws . . . provide explicit standards to those who apply them."

Coleman v. City of Richmond, 5 Va. App. 459, 466, 364 S.E.2d 239, 243, reh'g denied, 6 Va. App. 296, 368 S.E.2d 298 (1988) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972)). The vagueness doctrine recognizes that legislatures encounter "practical difficulties in drawing criminal statutes

both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957, 32 L.Ed.2d 584 (1972). As a result, penal statutes need only define crimes to "'a reasonable degree of certainty.'" Woolfolk v. Commonwealth, 18 Va. App. 840, 850, 447 S.E.2d 530, 535 (1994) (quoting Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 331, 96 L.Ed. 367 (1952)).

We hold that Code § 18.2-60.3 is not unconstitutionally vague either on its face or as applied to appellant. Both the "reasonable fear" element and the requirement of specific intent

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make the statute sufficiently clear to inform both citizens and law enforcement officers of what acts constitute stalking. First, the objective "reasonable fear" element provides considerable guidance about the scope of stalking under Code § 18.2-60.3. By qualifying the word fear with the word "reasonable," the General Assembly intended to limit the reach of Code § 18.2-60.3 to conduct that would render an ordinary, reasonable person in the victim's circumstances in fear for his or her physical well-being. Contrary to appellant's assertions, this objective standard protects citizens who engage in non-threatening day-to-day contact with others from surprise prosecution because the conduct

proscribed by Code § 18.2-60.3 "does not vary with the particular psychological makeup of the victim." Woolfolk, 18 Va. App. at 849, 447 S.E.2d at 535.

In addition, the "reasonable fear" element restrains law enforcement officers who investigate reports of stalking from arbitrarily enforcing Code § 18.2-60.3 because they have an objective baseline with which to evaluate the victim's complaint. Under this objective standard, the statute provides adequate notice that it proscribes repeated conduct that is either an express threat of physical harm or would be reasonably interpreted by the victim as a threat of impending physical harm in light of the history of the parties' relationship.

The requirement of specific intent also enhances the delineation in Code § 18.2-60.3 of stalking from otherwise legal conduct. Citizens know that they are subject to prosecution for

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causing reasonable fear in others only if they intended their conduct to have this effect or know that it will have that effect. Appellant interprets Code § 18.2-60.3 to reach Orwellian proportions and argues that the statute is so vague that ordinary telephone solicitation, bill collecting and political polling could be deemed stalking. However, the inclusion of the requirement of specific intent or knowledge provides notice to individuals engaging in these activities in

an ordinary manner that they are not stalking their callers within the meaning of Code § 18.2-60.3 unless they intend to do so or know that they are doing so. "By requiring specific intent in conjunction with more than one overt act, the statute gives a person of ordinary intelligence a reasonable opportunity to know what is proscribed." Woolfolk, 18 Va. App. at 851, 447 S.E.2d at 536 (citing Boyce, 342 U.S. at 342, 72 S. Ct. at 331-32 (stating that requirement of specific intent does much to destroy any force in argument that statute is vague)).

We also hold that Code § 18.2-60.3 was not unconstitutionally vague as applied to appellant. The language of the statute gave him reasonable notice that his conduct in this case was stalking. The evidence proved that appellant engaged in frenzied sprees of phone calls that he knew would cause the victim to worry for her safety upon his pending release from jail. He was aware of his past abusive relationship with the victim and the fact that he had previously been convicted for placing her in reasonable fear of bodily harm. He knew that his

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release date from jail was in two months. Appellant also knew from his first few calls on March 5 that his contact with the victim was unwelcome. Undaunted by this knowledge, he continued his barrage of calls. On March 5, he told the victim, "I'll be out," and, "It will never end." On March 8, appellant indicated his own awareness that his

calls made the victim fearful when he said to her, "Don't be afraid." He proceeded to call her two more times on March 8, five times on March 10, and five times on March 11. Contrary to appellant's characterization, this series of calls is not indicative of a benign lover's quarrel. Instead, when viewed in context, appellant's calls were part of a concerted effort to plant fear in the victim's mind that his conduct would escalate into actual physical violence upon his release from jail. This type of intentional campaign of intimidation is within the clear ambit of Code § 18.2-60.3.

B.

OVERBREADTH

Appellant contends that Code § 18.2-60.3 is unconstitutionally overbroad because it chills protected speech. Appellant argues that the face of the statute prohibits legitimate speech by a lover attempting to reconcile a dispute with his or her companion. Appellant argues that the statute is overbroad as applied to him because he was attempting such a reconciliation by calling the victim from his jail cell. He also asserts that his conviction was based solely on the content of his short messages during these calls. We disagree.

A statute may be overbroad if it "is one that is designed to burden or punish activities which are not constitutionally

protected, but the statute includes within its scope activities which are protected by the First Amendment." Woolfolk, 18 Va. App. at 851, 447 S.E.2d at 536 (citation omitted). Overbreadth is a doctrine whose reach dissipates when a statute proscribes primarily conduct and not speech. If a penal statute proscribes both conduct and speech, "the overbreadth of the statute must . . . be substantial . . . in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18, 37 L.Ed.2d 830 (1973). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for [the statute] to be facially challenged on overbreadth grounds." City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 2126, 80 L.Ed.2d 772 (1984) (citation omitted) (footnote omitted).

We hold that Code § 18.2-60.3 is not facially overbroad. The statute's purpose is legitimate: to protect innocent citizens from intentional or knowingly threatening conduct that subjects them to a reasonable fear of physical harm. Furthermore, the statute is tailored so that it does not substantially infringe upon speech protected by the First Amendment. It regulates the manner in which individuals interrelate with one another and prohibits individuals from communicating with others in a way that is intended or known to

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cause fear or physical harm. Code § 18.2-60.3 is not

directed primarily at speech nor does it overreach to prevent contact, speech or otherwise, between quarreling lovers as appellant suggests. Indeed, the statute permits all communications between individuals that are conducted in a time, place and manner that do not intentionally or knowingly cause the receiver of the message reasonably to fear for his or her physical safety. The statute's legitimate sweep does not portend any substantial burden on constitutionally protected conduct, and we find no realistic danger that the statute will compromise the First Amendment rights of parties not before the Court.

Turning to appellant's conduct, we hold that Code § 18.2-60.3 was not overbroad as applied to him. Contrary to his assertion, appellant was not convicted of stalking solely because of the seven sentences he uttered on March 5 and March 8. He violated the stalking statute because he made a barrage of calls to a person with whom he had an abusive relationship with the knowledge that the calls caused the victim to reasonably fear bodily injury at his hands. Appellant's intimidating phone contact and veiled threats rendered his interaction with the victim from March 5 and March 11 without constitutional protection and violative of Code § 18.2-60.3.

For the foregoing reasons, we affirm the conviction of the stalking in violation of Code § 18.2-60.3.

Affirmed

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II. Other opinions, orders, findings of fact, and conclusions of law entered in the case by courts:

First Order of Circuit Court
entered September 12, 1995

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF, HELD ON SEPTEMBER 5, 1995

PRESENT: HON. PAUL M. PEATROSS, JR.

COMMONWEALTH OF VIRGINIA
VS. INDICTMENT NUMBER 10,806
MICHAEL A. S. PARKER

This day came again the Attorney for the Commonwealth and **Michael A. S. Parker**, whose date of birth is January 23, 1964, who stands indicted for a felony, to-wit: On or about March 5, 1995, to March 28, 1995 in the County of Albemarle, **Michael A. S. Parker**, did unlawfully and feloniously on more than one occasion engage in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury to that person, this being a third or subsequent offense; was led to the bar of this Court in the custody of the Sheriff of this County and came also,

Willis Spaulding, his court-appointed attorney.

On August 31, 1995 the Court heard the defendant's motion to dismiss the indictment at which time the Court overruled the motion on the issue of the stalking statute being unconstitutional and took the motion under advisement as to whether the charge is a misdemeanor within the meaning of the statute.

Having considered the motion, the Court finds that the first of the defendant's two prior convictions was under the

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former, less stringent statute and finds that the charge is a misdemeanor, second offense, within the meaning of the statute.

Therefore the Indictment shall be amended to charge that:

> On or about March 5, 1995, to March 28, 1995, in the County of Albemarle, Michael A. S. Parker, did unlawfully, on more than one occasion, engage in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury to that person, this being a second offense, within five (5) years; in violation of Virginia Code § 18.2-60.3.

Whereupon the accused, after private consultation with

counsel, and being advised by his counsel entered a plea of Not Guilty to the Amended Indictment. And after being advised of his right to trial by jury, the accused in person, knowingly and voluntarily waived trial by jury, and with the concurrence of the Attorney for the Commonwealth and the Court, here entered of record, the Court proceeded to hear evidence presented by the Attorney for the Commonwealth at the close of which counsel for the defendant moved the Court to strike as no evidence had been presented showing a first offense. The Court granted the motion as to second offense and proceeded with the trial on a first offense basis. Having heard the evidence and argument of counsel the Court finds the accused **GUILTY** of:

> On or about March 5, 1995, to March 28, 1995, in the County of Albemarle, Michael A. S. Parker, did unlawfully, engage in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury to that person; in violation of Virginia Code § 18.2-60.3.

It being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant be sentenced to confinement in jail for the term of six months.

It is further ORDERED that the defendant pay the

Court costs in this matter by February 5, 1996 or appear in this Court on February 5, 1996 at 9:30 a.m. to show cause why such costs have not been paid.

The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney.

The defendant was remanded to jail.

ENTER: /s/ Paul M. Peatross
Judge
DATE: 9/12/95

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Second Order of Circuit Court
entered September 12, 1995

VIRGINIA, IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF.

PRESENT: HON. PAUL M. PEATROSS, JR.

COMMONWEALTH OF VIRGINIA
VS. INDICTMENT NO. 10,806
MICHAEL A. S. PARKER

On September 5, 1995, Michael A. S. Parker was convicted of: On or about March 5, 1995, to March 28, 1995, in the County of Albemarle, Michael A. S. Parker, did unlawfully, engage in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury to that person; in violation of Virginia Code § 18.2-60.3.

On September 11, 1995, counsel for the defendant, Willis J. Spaulding filed a motion to set aside the conviction. Upon careful consideration of the motion and the facts of the case, the Court denies said motion.

It is the further **ORDER** of this Court that Michael A. S. Parker have no contact whatsoever, whether direct or indirect with the person or property of Judy Lynn Arnold, her spouse or her child/children.

A copy of this Order shall be served upon **Michael A. S. Parker, 133 Covesville Road, State Route 841, Covesville, Virginia.**

ENTER: /s/ Paul M. Peatross
Judge
DATE: 9/12/95

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Circuit Court's Written, Statement of Facts, Testimony and Other Incidents of Trial

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA

V. INDICTMENT NUMBER 10,806

MICHAEL PARKER

WRITTEN STATEMENT OF FACTS, TESTIMONY AND OTHER INCIDENTS OF TRIAL

The defendant, Michael A. S. Parker, was charged with third offense stalking in violation of § 18.2-60.3 of the Virginia Code, as that statute was amended, effective July 1, 1994. Specifically, it was alleged that on or about March 5, 1995, to March 28, 1995, in the County of Albemarle, Parker did unlawfully engage in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury to that person in violation of Virginia Code § 18.2-60.3, **this being a third offense within five (5) years.** [highlighted material being an interlineation by the trial judge and bearing his initials and the date: /s/ PMP 11/9/95]. The trial was held without a jury on September 5, 1995. Prior to trial the defendant

moved to dismiss the indictment on the grounds that the statute as applied to him was unconstitutionally overbroad and vague. This motion was made in the form of a motion to strike at the conclusion of the Commonwealth's evidence, and the conclusion of all evidence, and on September 11, 1995, in a motion to set aside the conviction. Except as noted below, all motions were denied, and exceptions noted, by the Court. Except for the pretrial motion, all motions were based on both constitutional grounds of vagueness and

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overbreadth, as well a insufficiency of the evidence.

The Court granted Parker's pretrial motion to dismiss the charge of third offense stalking on the grounds that Parker's alleged first conviction had been under the pre-1994 stalking law which was written differently than the statute which [sic.] he was now charged. The Court partially granted Parker's motion to strike at the conclusion of Commonwealth's evidence in that it struck the charge of second offense stalking because the Commonwealth had not introduced evidence of any prior conviction.

The evidence at trial was that Arnold knew that the [sic.] Parker was incarcerated at the time of the phone calls. She testified that she felt "safe" as long as he was in jail. Because she had a call identification device on her phone and she recognized the number which was calling her, she knew the calls were from the [sic.] Parker and that he was in jail before she picked up the phone. All calls were made from the jail.

Arnold admitted receiving Defense Exhibit A, a letter from the Commonwealth Attorney, prior to receiving the calls from Parker in March of 1995. She had received calls from Parker in February of 1995, for which Parker was not prosecuted. Arnold said that she felt fear on the occasion of each call. She also said that she had felt the same fear constantly since 1989, when she began a relationship with Parker, marked by breakups and reconciliations, as well as what she called abuse, and that she could not distinguish between the fear she felt prior to March 5, 1995, when the "first" call began and afterward. She also said

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that the calls had made her as angry as they had made her fearful.

The Commonwealth introduced Arnold's written notes of the phone calls received that the comments which Arnold said that Parker made. Most of the calls contained no message. None of the messages in the calls contained a threat.

Arnold took no additional security measures at her residence, which she shared with two males. She said that she could have arranged with the jail to have blocked the calls from the jail prior to March 5, 1995, when the first phone call covered by the criminal charges occurred, or she could have had her roommates answer the phone when the caller identification device indicated a call from the jail, but

she did not because she wanted to assist the prosecution.

Officer Tolliver, who oversaw phone calls from inmates at the jail said that the law enforcement authorities had begun to collect evidence against the defendant before the March 5, 1995, phone call was received.

At the conclusion of trial the Court convicted Parker of first offense stalking.

This statement incorporates as well exhibits introduced at trial or [sic.] and refused as evidence by the Court, if any.

Entered this 9th day of November, 1995.

/s/ Paul M. Peatross
Judge

Certified as correct as edited.
/s/ P. M. Peatross, Judge

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Order of Court of Appeals of Virginia, granting defendant's Petition for Appeal

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON MONDAY THE 16TH DAY OF SEPTEMBER, 1996

Michael A. S. Parker, Appellant,

against Record No. 2124-95-2
Circuit Court No. 10,806

Commonwealth of Virginia Appellee.

From the Circuit Court of Albemarle County Before Chief Judge Moon, Retired Judges Coulter and Griffith

A judge of this Court having determined that this petition should be granted, an appeal is hereby awarded to the petitioner from a judgment of the Circuit Court of Albemarle County dated September 12, 1996.

No bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

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Order of Supreme Court of Virginia, refusing appeal from Court of Appeals of Virginia

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON TUESDAY THE 23RD DAY OF SEPTEMBER, 1997.

MICHAEL PARKER, APPELLANT,

against Record No. 971450
Court of Appeals No,. 2124-95-2

COMMONWEALTH OF VIRGINIA, APPELLEE

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Albemarle County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courtS below.

. . . .

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee $200.00 plus costs and expenses

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III. Orders on rehearing:

Order of the Court of Appeals of Virginia of Virginia, denying petition for rehearing en banc

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA ON FRIDAY THE 20TH DAY OF JUNE, 1997.

Michael A. S. Parker, Appellant,

against Record No. 2124-95-2
Circuit Court No. 10,806

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of May, 1997 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17-116.02(D).

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IV. Constitutional provisions and statutes required by subparagraph 1(f) of U.S. Supreme Court Rule 14:

U.S. Const., Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the Untied States, or any any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services of suppressing insurrection or rebellion, shall be not questioned. But neither the United States nor any state shall assume or okay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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18.2-60.3, Code of Virginia Annotated, As Effective July 1, 1995

A. Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of a Class 2 misde-

meanor.

B. However, any person who is convicted of a first offense in violation of subsection A when, at the time of the offense, there was in effect any order prohibiting contact between the defendant and the victim or the victim's spouse or child, shall be guilty of a Class 1 misdemeanor.

C. A second conviction occurring within five years of a first conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class I misdemeanor. A third or subsequent conviction occurring within five years of a conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

D. A person may be convicted under this section irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct described in subsection A occurred, if the person engaged in that conduct on at least one occasion in the jurisdiction where the person is tried.

E. Upon finding a person guilty under this section, the court shall, in addition to the sentence imposed, issue an order prohibiting contact between the defendant and the victim or the victim's spouse or child.

F. The Department of Corrections, sheriff, or regional jail director shall give notice prior to the release from a state correctional facility or a local or regional jail of any person incarcerated upon conviction of a violation of this section, to any victim of the offense who, in writing, requests notice, or to any person designated in writing by the victim. The notice shall be given at least fifteen days prior to release of a person sentenced to a term of incarceration of

more than thirty days or, if the person was sentenced to a term of incarceration of at least forty-eight hours but no more than thirty days, twenty-four hours prior to release. If the person escapes, notice shall be given as soon as practicable following the escape. The victim shall keep the Department of Corrections, sheriff or regional jail director informed of the current mailing address and telephone number of the person named in the writing submitted to receive notice.

All information relating to any person who receives or may receive notice under this subsection shall remain confidential and shall not be made available to the person convicted of violating this section.

For purposes of this subsection, *"release"* includes a release of the offender from a state correctional facility or a local or regional jail (i) upon completion of his term of incarceration or (ii) on probation or parole.

No civil liability shall attach to the Department of Corrections nor to any sheriff or regional jail director or their deputies or employees for a failure to comply with the requirements of this subsection.

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§ 18.2-60.3, Code of Virginia Annotated, As Effective July 1, 1996

A. Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual

assault, or bodily injury to that other person or to that other person's spouse or child shall be guilty of a Class 2 misdemeanor.

B. However, any person who is convicted of a first offense in violation of subsection A when, at the time of the offense, there was in effect any order prohibiting contact between the defendant and the victim or the victim's spouse or child, shall be guilty of a Class 1 misdemeanor.

C. A second conviction occurring within five years of a first conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class I misdemeanor. A third or subsequent conviction occurring within five years of a conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

D. A person may be convicted under this section irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct described in subsection A occurred, if the person engaged in that conduct on at least one occasion in the jurisdiction where the person is tried. Evidence of any such conduct which occurred outside the Commonwealth may be admissible, if relevant, in any prosecution under this section provided that the prosecution is based upon conduct occurring within the Commonwealth.

E. Upon finding a person guilty under this section, the court shall, in addition to the sentence imposed, issue an order prohibiting contact between the defendant and the victim or the victim's spouse or child.

F. The Department of Corrections, sheriff, or regional jail director shall give notice prior to the release

from a state correctional facility or a local or regional jail of any person incarcerated upon conviction of a violation of this section, to any victim of the offense who, in writing, requests notice, or to any person designated in writing by the victim. The notice shall be given at least fifteen days prior to release of a person sentenced to a term of incarceration of more than thirty days or, if the person was sentenced to a term of incarceration of at least forty-eight hours but no more than thirty days, twenty-four hours prior to release. If the person escapes, notice shall be given as soon as practicable following the escape. The victim shall keep the Department of Corrections, sheriff or regional jail director informed of the current mailing address and telephone number of the person named in the writing submitted to receive notice.

All information relating to any person who receives or may receive notice under this subsection shall remain confidential and shall not be made available to the person convicted of violating this section.

For purposes of this subsection, *"release"* includes a release of the offender from a state correctional facility or a local or regional jail (i) upon completion of his term of incarceration or (ii) on probation or parole.

No civil liability shall attach to the Department of Corrections nor to any sheriff or regional jail director or their deputies or employees for a failure to comply with the requirements of this subsection.

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§ 18.2-60.3, Code of Virginia Annotated, As Effective July 1, 1997

A. Any person who on more than one occasion engages in conduct directed at another person with the intent to place, or with knowledge that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person ot that other person's family or household member shall be guilty of a Class 2 misdemeanor.

B. However, any person who is convicted of a first offense in violation of subsection A when, at the time of the offense, there was in effect any order prohibiting contact between the defendant and the victim or the victim's family or household member, shall be guilty of a Class 1 misdemeanor.

C. A second conviction occurring within five years of a first conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class I misdemeanor. A third or subsequent conviction occurring within five years of a conviction for an offense under this section or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

D. A person may be convicted under this section irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct described in subsection A occurred, if the person engaged in that conduct on at least one occasion in the jurisdiction where the person is tried. Evidence of any such conduct which occurred outside the Commonwealth may be admissible, if relevant, in any prosecution under this section provided that the prosecution

is based upon conduct occurring within the Commonwealth.

E. Upon finding a person guilty under this section, the court shall, in addition to the sentence imposed, issue an order prohibiting contact between the defendant and the victim or the victim's family or household member.

F. The Department of Corrections, sheriff, or regional jail director shall give notice prior to the release from a state correctional facility or a local or regional jail of any person incarcerated upon conviction of a violation of this section, to any victim of the offense who, in writing, requests notice, or to any person designated in writing by the victim. The notice shall be given at least fifteen days prior to release of a person sentenced to a term of incarceration of more than thirty days or, if the person was sentenced to a term of incarceration of at least forty-eight hours but no more than thirty days, twenty-four hours prior to release. If the person escapes, notice shall be given as soon as practicable following the escape. The victim shall keep the Department of Corrections, sheriff or regional jail director informed of the current mailing address and telephone number of the person named in the writing submitted to receive notice.

All information relating to any person who receives or may receive notice under this subsection shall remain confidential and shall not be made available to the person convicted of violating this section.

For purposes of this subsection, *"release"* includes a release of the offender from a state correctional facility or a local or regional jail (i) upon completion of his term of incarceration or (ii) on probation or parole.

No civil liability shall attach to the Department of Corrections nor to any sheriff or regional jail director or their deputies or employees for a failure to comply with the requirements of this subsection.

G. As used in this section the term *"family or household member"* shall have the same meaning as provided in § 16.1-228.

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V. Other materials required by subparagraph 1(g)(i) of U.S. Supreme Court Rule 14:

Defendant's Pretrial Motion to Dismiss Indictment

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA

v.

MICHAEL PARKER

MOTION TO DISMISS INDICTMENT

Comes now the defendant, MICHAEL PARKER, by counsel, and moves this Court to dismiss the indictment against him for third offense stalking on the two separate grounds. First, the statute under which he is indicted, Va. Code Ann. § 18.2-60.3 (Cum. Supp. 1994) is unconstitutional as applied to him. Second, the prosecution is premised on two prior convictions for violation of the

same statute. The first of his two prior convictions was under a less stringent, predecessor statute, amended in 1994. The present charge therefore does not constitute a third-offense, is not a felony charge, and is not within the jurisdiction of this Court.

Both of these issues were briefed at the conclusion of the preliminary hearing. The General District Court without an opinion rejected the defendant's arguments and certified the case to the grand jury which indicted the defendant. While the record of the preliminary hearing has been transcribed and is available to the Court for inspection, and the facts of the case have been set forth below, the Court is now in a position to address the defendant's arguments without the need of a trial.

Facts

The evidence, seen in a light most favorable to the Commonwealth can be summarized quickly. Over a period of about a week last March, Parker attempted a series of collect calls from the jail, where he was incarcerated, to a former girlfriend, Judy Arnold. There were about thirty attempted calls, none of which were accepted. On seven of the calls the caller said something, and his voice was recognized as the defendant's.

The seven statements made by the incarcerated caller contained neither threats of violence nor indications that the caller would be making any physical contact with Arnold.

Arnold, who had an on-again-off-again relationship with

Parker, knew how to block calls from the jail, and had done so in the past to impede contact with Parker. Because of caller i.d., she knew before she picked up the first call that it was from Parker who was in jail. On the advice of the Commonwealth's Attorney she did not block his calls, and instead continued to pick up the phone and kept notes of the time and content of the calls.

Arnold did not take any measures to protect herself. When asked by the prosecution if she had experienced "fear," she said, "Yes." when asked what the fear was of she responded that it was of Parker "doing something to me or my property." She admitted that she knew that he was in fact not capable of "doing something" to her or her property.

Issues

1. Is the stalking statute, VA. CODE ANN. § 18.2-60.3 (Cum. Supp. 1994), unconstitutional as applied to Parker?

2. Is the charge a misdemeanor, second offense within the meaning of the statute?

Parker urges the Court to answer both of these questions, "Yes."

Argument

1. For the purposes of this argument, Parker concedes that the stalking statute as it is now written is on its face constitutional. *Woolfolk v. Commonwealth*, 18 Va.App. 530, 447 S.E.2d 530 (1995). The panel in *Woolfolk* seems to

have reasoned that the statute was saved from facial vagueness and overbreadth by the requirement of a specific intent to "cause emotional distress to another person by placing that person in reasonable fear of death or bodily injury."

This carefully defined specific intent was further narrowed effective July 1994 to require proof that the defendant specifically intended to cause the "reasonable fear of death, criminal sexual assault, or bodily injury." The 1994 statute allows this intent to be inferred from the "knowledge that the conduct places" the victim in such reasonable fear. The 1994 statute is narrower in that it requires proof that the defendant directly sought to create a fear of death, criminal sexual

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assault or bodily injury, rather than simply trying to distress the victim in some general way.[1]

Without this carefully defined specific intent, the offense would consist simply of "conduct." Unlike other states which define the conduct in terms of, for example, following, the Virginia statute does not define conduct in any way, except by reference to the intent which accompanies it.

The *Woolfolk* Court noted that in determining the specific intent the finder of fact could "infer that a person intends the natural and probable consequences of his acts."

Prior to *Woolfolk* the leading Virginia case on stalking was the written decision by Judge Robertson in *Commonwealth v. Camper* (Richmond General District

Court, April 9, 1993). This decision, which received favorable attention nationally[2], found the stalking statute unconstitutionally vague and overbroad. The 1994 amendments discussed above are an attempt to address the

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[1]. The Commonwealth has argued in the General District Court that it is "irrelevant" whether the defendant actually caused fear. Letter of Cheryl V. Higgins to the Honorable Stephen H. Helvin, dated June 8, 1995, at 3. If this is so, the 1994 statute is much broader than the original 1992 law which required that the victim, intentionally or unintentionally, be placed in reasonable fear. Under the Commonwealth's interpretation of the law, *Woolfolk* would not be applicable, since it ruled that the 1992 statute anticipated using the results of conduct as evidence from which the intent of the conduct could be inferred.

[2]. See, e.g., Faulkner & Hsaio, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 HARV.J. ON LEGIS. 1, 2, 24 (1994); Note, *"Stalk Talk": A First Look at Anti-Stalking Legislation*, 50 WASH. & Lee L.REV. 1303, 1324 (1993). These authors, and Judge Robertson based their critiques of Virginia law on the pre-1994 law which only required intent to cause emotional distress.

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concerns of the *Camper* decision. The decision is therefore important in understanding the legislative intent in the 1994 amendments. *Camper* is also important because, as the amended stalking statute is applied to the facts in this case,

it runs afoul of *Camper's* requirement of a "credible threat."

California, the first state to enact antistalking legislation, in defining the proscribed conduct, uses the concept of a "credible threat." Judge Robertson, in *Camper* was concerned that without such a requirement the Virginia statute would make it "a crime for a person in Saltville to use voodoo dolls to place a curse of death on someone in Virginia Beach." (Slip opinion at 7, enclosed). Without a credible threat requirement, speech which presented no clear and present danger, could be the basis of prosecution.

The 1994 amendment restricted the application of the statute to conduct that was accompanied by an intent to cause a reasonable fear of death, criminal sexual assault or physical injury. This could be viewed as the equivalent of a credible threat requirement. Because there was on the facts of the *Woolfolk* case a credible threat, which included death threats and physical stalking, that decision does not invalidate the credible threat requirement of *Camper*.

If, however, the statute is viewed as restricting the non-threatening speech of an incarcerated person, whether or not that speech caused a fear of his "doing something to me or my property," then, as applied to Parker, the statute is unconstitutionally vague and overbroad. Parker's conduct was purely speech and because of incarceration, a fact communicated to the [sic.] Arnold simultaneously with the telephone call by her telephone equipment, it could not present a "clear and present danger" to Arnold.

Parker's speech was not tantamount to falsely yelling "fire" in a crowded theater. Since his speech was protected by the First Amendment, it can only be regulated by the least restrictive means available to the state. Since he was

in the custody of the state, there was more than the usual array of remedies available to the state, starting with the obvious blocking of the Arnold number from call from the jail. This measure was sought by both Arnold and Parker, but was not employed by the choice of the Commonwealth Attorney. There was in addition the option of restricting Parker's conduct through lesser charges such as one under VA. CODE ANN. § 18.2-429 (Cum. Supp. 1994) (Causing a telephone to ring with intent to annoy).

If speech which presents no clear and present danger and which causes the person to whom it is directed to fear that the speaker will someday "do something to me or my property," is covered by the stalking statute then the statute is not only overbroad because it restricts protected speech, but it is unconstitutionally vague. No one could ever have notice of what harmless comments or conduct might lead a listener to fear that the speaker would eventually do something, however slight, to her or her property.

This issue can be decided by the Court prior to trial because of the Commonwealth's position that both the

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impossibility of the defendant harming Judy Arnold and the absence of fear in Judy Arnold are not even relevant to the prosecution. The indictment in that context is for non-threatening speech that could not be accompanied by action and which did not cause fear. Such a charge is unconstitutional, and should not be used to put the defendant to the trouble of a trial, and to hold him without bail.

2. Michael Parker was first convicted for stalking under a different statute than that under which he is now charged. The Commonwealth's position that the current charge is under a statute that is broader than the statute under which the defendant was first convicted in the sense that actual fear is irrelevant. The defendant's position is that the 1994 amendment narrowed the offense. Both sides agree that the statute is different.

And there can be no question that both statutes required for enhancement of the offense to a felony two prior convictions under the "same" statute, or if the conviction was in a different state a "similar" statute. The legislature knew how to use the words "same" and "similar," and for whatever reason chose to limit prior convictions for purposes of enhancement to those under the "same" Virginia statute. Just as the Commonwealth would argue that a re-codification of Chapter 888 of the 1992 Acts of General Assembly into a different section would not in itself create a different statute for this purpose, the use of the same code section for superseding acts does not make then [sic.] the "same" law.

Conclusion

For the reasons stated above the indictment should be dismissed.

[Filed 8/31/95]

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Defendant's Motion to Set Aside Conviction

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA

v.

MICHAEL PARKER

MOTION TO SET ASIDE CONVICTION

Comes now the defendant, MICHAEL PARKER, by counsel, pursuant to Rule 3A:15 of the Rules of the Supreme Court of Virginia, and moves this Court to set aside the defendant's conviction at a bench trial on September 5, 1995.

For grounds of this motion the defendant says that the evidence was insufficient to support a conviction on the charge of stalking and the stalking statute, §18.2-60.3, was unconstitutionally vague and overbroad as applied to the defendant.

The evidence was that the alleged victim knew that the defendant was incarcerated at the time of the phone calls. She testified that she felt "safe" as long as he was in jail. She knew the calls were from the defendant that he was in jail before she picked up the phone.

Defense Exhibit A shows that she was deliberately

responding to the defendant's calls in order to set him up for a felony conviction. Although Ms. Arnold said that she felt fear on the occasion of each call, she also said that she had felt the same fear constantly since 1989 and that she could not distinguish between the fear she felt prior to March 5, 1995, when the

"first" call began and afterward.

The call which the Court emphasized, in which the defendant was heard to say "Don't be afraid," was not explained to have been interpreted by the recipient in any special way, and should be taken at face value as a non-threatening statement.

The evidence was uncontradicted that the alleged victim took no additional security measures. She admitted that she could have blocked the calls from the jail, but did not because she wanted to assist the prosecution.

Officer Tolliver's testimony added nothing to the prosecution's case. It did confirm that the law enforcement authorities had begun to collect evidence against the defendant before the March 5, 1995, phone call was received.

In summary, there was no evidence to support a finding that the defendant's specific conduct consisting of approximately seven short non-threatening phone messages in themselves caused a reasonable fear of death, serious physical injury or criminal sexual assault. In the absence of

that fear, there is no evidentiary basis from which to infer an intent to cause that fear.

Apart from the insufficiency of the evidence, the defendant's claim made before trial and at his motion to strike that the statute is unconstitutional as applied to him has strengthened. The Commonwealth has taken the position that anything the defendant said however innocuous it was on its face and however incapable the defendant was of physically threatening

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Ms. Arnold was a violation of the stalking statute because of the tumultuousness of the couple's past relationship. Yet there was no evidence that Ms. Arnold had ever been harmed to the extent that she needed medical treatment or had brought assault charges against the defendant as opposed to stalking charges.

The statute is in this respect overbroad since, as applied, it condemns virtually any expressive gesture by the defendant that gets communicated to the defendant, and reminds her of his existence.

The statute is vague, as applied, because persons in the position of the defendant must live in constant danger of prosecution for remarks which are neither threatening in tone or manner, and may not in themselves cause a particular fear in the victim, but may in light of past conduct, remotely imply an intent to cause such fear.

For these reasons, the defendant respectfully moves the Court to set aside his conviction.

[Filed 9/11/95]

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Excerpts from Parker's Opening Brief on Appeal to the Court of Appeals of Virginia:

Questions Presented on Appeal

IN THE
COURT OF APPEALS OF VIRGINIA

RECORD NO. 2124-95-2

MICHAEL A. S. PARKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

STATEMENT OF THE QUESTIONS PRESENTED

I. Is the evidence legally insufficient to support a conviction for stalking?

II. Is the stalking statute unconstitutionally overbroad, as applied and on its face?

III. Is the stalking statute unconstitutionally vague, as applied and on its face?

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Excerpts from Parker's Petition for Appeal to the Supreme Court of Virginia:

Assignments of Error

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

MICHAEL PARKER, APPELLANT,

against Record No. 971450
Court of Appeals No. 2124-95-2

COMMONWEALTH OF VIRGINIA, APPELLEE

PETITION FOR APPEAL

ASSIGNMENTS OF ERROR

I. The trial court erred in denying the motion to strike and the motion to set aside the verdict by the petitioner and convicting the petitioner, because the evidence was legally insufficient to convict the petitioner.

II. The trial court erred in denying the motion to strike and the motion to set aside the verdict by the petitioner, and convicting the petitioner, because the statute under which he was convicted was unconstitutionally overbroad.

III. The trial court erred in denying the motion to strike and the motion to set aside the verdict by the petitioner, and convicting the petitioner, because the statute under which he was convicted was unconstitutionally vague.

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VI. Other materials petitioner believes essential to understand the petition:

Commonwealth's Exhibit 1 at Trial

COMMONWEALTH'S EXHIBIT 1 AT TRIAL

3/8	3:54	984-0949
3/8	4:00	"
3/8	4:02	"
3/8	4:04	"
3/8	4:06	"
3/8	4:28	"
3/8	4:30	" No data sent
3/8	4:32	" No data sent
3/8	4:35	No data sent
3/8	4:42	"Don't be afraid"
3/8	4:50	"Please pick up" then operator
3/8	5:00	No data sent
3/8	5:03	"You hate me"
3/10	8:26	984-0949
3/10	8:42	"
3/10	8:45	"
3/10	8:46	"
3/10	8:47	"
3/11	11:51	"
3/11	2:35	"

Phone calls from Mike

2/5	12:45 pm	collect call
2/11	5:57 pm	293-6255
2/22	9:50 pm	984-0973

	2/23	5:53 pm	984-0973
	2/23	6:14 pm	984-0973
	2/23	6:18 pm	984-0973
	2/24	9:33 pm	984-0973
	2/25	6:03 pm	"
	2/26	8:06 pm	"
	2/26	8:12 pm	"
	2/26	8:18 pm	"
	2/26	8:41 pm	"
	2/27	2:45 pm	"
	2/27	3:16 pm	"
	2/27	3:53 pm	"
*	3/5	8:05 pm	984-0949
*	3/5	8:10 pm	"
	3/5	8:55 pm	"
*	3/5	8:57 pm	"
*	3/5	9:01 pm	" O.K. Let's end it
*	3/5	9:04 pm	" #
*	3/5	9:06 pm	" #
*	3/5	9:11 pm	It'll never end
*	3/5	9:12 pm	You know you lied
	3/5	9:14 pm	" #
*	3/5	9:17 pm	I'll be out
	3/11	4:ll pm	"
	3/11	4:15 pm	"
	3/11	4:23 pm	"
	3/13	12:44 pm	"

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Excerpts from Parker's Opening Brief on Appeal to the Court of Appeals of Virginia:

Pertinent portions of Statement of Facts

IN THE
COURT OF APPEALS OF VIRGINIA

RECORD NO. 2124-95-2

MICHAEL A. S. PARKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF OF APPELLANT

STATEMENT OF FACTS

The appellant, Michael A. S. Parker, was charged with third offense stalking in violation of § 18.2-60.3 of the Virginia Code, as that statute was amended, effective July 1,

1994. Specifically, it was alleged that on or about March 5, 1995, to March 8, 1995, in the County of Albemarle, Parker unlawfully engaged in conduct directed at Judy Lynn Arnold with the intent to place, or with the knowledge that the conduct placed, such person in reasonable fear of death, criminal sexual assault or bodily injury to that person in violation of Virginia Code § 18.2-60.3. Prior to the trial Parker moved to dismiss the indictment on the grounds that the statute as applied to him was unconstitutionally overbroad and vague. This motion was made in the form of a motion to strike at the conclusion of the Commonwealth's evidence, and the conclusion of all evidence, and on September 11, 1995, in a motion to set aside the conviction. Except as noted below, all motions were denied, and exceptions noted by the court. Except for the pretrial motion, all motions were based on both constitutional grounds of vagueness and overbreadth, as well as insufficiency of the evidence.

The court granted Parker's pretrial motion to dismiss the charge of third offense stalking on the grounds that

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Parker's first conviction had been under the stalking law which was in force prior to July 1, 1994, and which was written differently than the statute under which he was now charged. The court partially granted Parker's motion to strike at the conclusion of Commonwealth's evidence in that it struck the charge of second offense stalking because the Commonwealth had not introduced evidence of any prior conviction under the current stalking law. Commonwealth Exhibit 3, at Appendix 8-9, was not introduced. See

Appendix 17. The Commonwealth has not appealed any ruling of the trial court.

Over a period of about a week in March, 1995, Parker attempted to make seven collect calls from the local jail, where he was incarcerated, to a former girlfriend, Judy Arnold. There were about thirty calls attempted by someone. On seven calls, a caller said something and his voice was recognized as Parker's. As to the other calls, there was not way to say who made the calls, except that they were made from Parker's cell block.

In each case Arnold knew in advance, from her telephone equipment, that the call was from Parker's cell block, and that he might be calling from the jail. In each case she chose to answer the phone in order to prosecute him. She listened to a short computer message announcing a collect call, and an even shorter message from the caller at the moment when the collect caller would ordinarily announce his

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name. She would then hang up.

The seven statements made by the incarcerated caller contained neither threats of violence nor indications that the caller would be making any physical contact with Arnold. The statements were of necessity very brief and sometimes occurred in succession. They included (as described in Appendix 2-3) the following four statements on March 5, 1995:

"O.k. Let's end it"
"It'll never end"
"You know you lied"
"I'll be out"

Three days later, on March 8, 1995, the following three statements were made:

"Don't be afraid"
"Please pick up"
"You hate me"

There is no evidence before this court that any of these statements was made in a menacing tone, or, or for that matter, any particular tone or manner. There is no evidence before this court that these statements carried any meaning for Arnold or Parker, apart from the ordinary meaning of the words. The written statement of facts specifies that "None of the messages in the calls contained a threat." Appendix at 18.

Arnold, who had an on-again-off-again relationship with

Parker since 1989, knew how to block calls from the jail and had done so in the past to impede calls from Parker. Sometimes she blocked the calls and sometimes she accepted the calls creating confusion as to whether contact was welcome.

The evidence at trial was that Arnold knew that Parker

was incarcerated at the time of the phone calls. She claimed she knew the calls were from Parker and that he was in jail before she picked up the phone because she had caller identification. She testified that she felt "safe" as long as he was in jail. She admitted that she could have blocked the calls from the jail, but did not because she wanted to assist the prosecution. On advice of the Commonwealth's Attorney, she did not block the calls and instead continued to pick up the phone and make notes of the time and content of the calls. Arnold admitted receiving Defense Exhibit A (Appendix at 10), a letter from the Commonwealth Attorney, prior to receiving the calls from Parker in March of 1995. Defense Exhibit A showed that Arnold was deliberately responding to the [sic.] Parker's calls in order to set him up for a felony conviction. The testimony of Officer Tolliver confirmed that law enforcement authorities had begun to collect evidence against Parker before the March 5, 1995, phone call was received.

Although Arnold said she a felt a non-specific fear on the occasion of each call, she also said that she had felt

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the same fear constantly since 1989, when she began a relationship with Parker, marked by breakups and reconciliations, and that she could not distinguish between the fear she felt prior to March 5, 1995, when the "first" call began and afterward. The record is silent as to what it was Arnold was afraid of but she admitted that she knew Parker was in fact incapable of doing anything to her or her property as a result of his incarceration. She also said that the calls made her as angry as they made her fearful.

The evidence was uncontradicted that Arnold took no additional security measures as a result of the calls.

At the conclusion of the trial the court convicted Parker of first offense stalking.

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Excerpts from Commonwealth's Responsive Brief on Appeal to the Court of Appeals of Virginia:

Statement of Facts

IN THE
COURT OF APPEALS OF VIRGINIA

RECORD NO. 2124-95-2

MICHAEL A. S. PARKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF OF THE COMMONWEALTH

STATEMENT OF FACTS

From March 5, 1995 to March 28, 1995, Parker made as many as thirty-five repeated telephone calls to Judy Arnold, his former girlfriend, at her home. (App. 2-3). Arnold's home telephone was equipped with "caller i.d.," so the telephone number from which the calls were being made was indicated on Arnold's telephone as each call was being placed. Parker telephoned Arnold from jail, and Arnold recognized the defendant's telephone number. (App. 17). The calls, many times, were within mere moments of each other.

Having previously been instructed to do so, Arnold took notes on the defendant's telephone calls. During some of the calls, Parker made remarks like, "please pick up," "you hate me," and "you know you lied." (App.2-3). Parker also left veiled threats like: ""Don't be afraid," and threatened, "It'll never end" and "I'll be out." (App. 2-3). Arnold said that she was fearful on the occasion of each call.

Arnold testified that although she knew that Parker was incarcerated at the time of the calls, she felt "safe" only as long as Parker was in jail. She had been notified by the Albemarle County Commonwealth's Attorney three days prior to the first call that the defendant had received a

tentative release date from incarceration for May. (App 10).

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Arnold said her fear of the defendant started in 1989, when she began a turbulent, and ultimately abusive, relationship with Parker. Although Arnold lived with two males, she testified the calls made her fearful and angry. She already had alerted investigators about Parker who had been previously convicted of stalking her under the pre-1994 amendment to the stalking statute and who had already resumed calling her in February. (App. 16-17). Evidence against Parker had been collected even before the March 5, 1995 calls began. (App. 18).

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Excerpts from Parker's Petition for Rehearing en banc in the Court of Appeals of Virginia

IN THE
COURT OF APPEALS OF VIRGINIA

RECORD NO. 2124-95-2

MICHAEL A. S. PARKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee

PETITION FOR REHEARING EN BANC

PETITION FOR HEARING EN BANC

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS OF VIRGINIA:

Pursuant to Rule 5A:34 of the Rules of the Supreme Court of Virginia the appellant, Michael Parker, by counsel,

respectfully requests rehearing en banc of the decision of a panel of this court, by Judge Larry G. Elder, rendered on May 13, 1997.

STATEMENT OF THE CASE

This is an appeal to the conviction of Michael A. S. Parker of first offense stalking in violation of § 18.2-60.3 of the Code of Virginia, as amended. The trial and verdict were on September 5, 1995. A motion to set aside the verdict was made and denied on September 11, 1995. The final order of judgment was entered on September 12, 1995. A writ of error was granted on September 16, 1996, and a panel of the Court affirmed the conviction on May 13, 1997.

ARGUMENT

In requesting rehearing by the Court, en banc, the appellant incorporates by reference those arguments cited in his briefs heretofore filed.

In addition Parker argues that the panel should not have

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relied on his past stalking convictions as evidence of the reasonableness of the prosecution witness's "fear." See, e.g., slip opinion at 10. The conviction under appeal is a "first offense" conviction, and therefore for the purposes of this appeal, there were no prior stalking convictions. In part his is because the prosecution failed to properly introduce evidence of prior convictions under the current stalking statute. In part it is because the court excluded the evidence

of a conviction under the prior stalking statute as irrelevant to the only issue it was offered for, and that was whether the current offense charged was a first, second, or third offense.

While there obviously is potential evidence of prior convictions, proffered by the Commonwealth in the appellate record, it just as obviously could not have been admitted and could not have served as a factual basis for the trial court's conviction of first offense stalking. Not only is it outside the statement of facts, it is inconsistent with the judgment of the trial court, that Parker's offense was a first offense.

The panel's reliance on Parker's past convictions also begs the questions he raises about the constitutionality of the stalking statute, which apply with equal force to prior convictions. To say that Parker cannot now claim that he was convicted under an impermissibly vague law because he had been convicted under the same law, or earlier law, before for some other, unspecified "conduct," never described or even alluded to at trial, is not only circular in reasoning, but seems to lower

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the level of proof needed after the first conviction for stalking for second or subsequent offenses.

An additional problem introduced into the controversy by the panel's opinion is its characterizing evidence in a manner which goes beyond the statement of facts. The panel referred to seven phone calls that were attributed to Parker as "frenzied sprees of phone calls" (slip opinion at 10) and "a concerted effort to plant fear in the victim's mind." (At

11). But the statement of facts makes it clear that whatever "fear" the victim had she had for years and that it did not change because of seven calls. (Appendix at 17).

There is absolutely nothing in the record that would permit the panel to infer that the victim in this case felt fear "of death, criminal sexual assault, or bodily injury." To say, as the panel did at page 5 of the slip opinion, that the specific fear could be inferred from her reference to her relationship as "abusive" is to vastly expand the scope of the statute. She did not say the defendant was abusive, only that the "relationship" was "abusive," a term today used to mean virtually anything. (Indeed, the knowledge that Parker was calling from jail made her feel, in the context of her abusive relationship, "safe.")

The statement of facts also indicates that the calls were in fact welcome in the sense that she did not block them as she could have, tell the caller not to call, etc., because she wanted to set Parker up for a stalking conviction. (Appendix at 17). There is no support in the statement of facts for the panel's

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assertion that Parker must have known his calls were "unwelcome." (Slip opinion at 6).

The panel was trying to read between the lines of the statement of facts for other facts that would have justified a conviction. For example, the statement by Parker, "Don't be afraid," must have meant, the panel reasons, "Be afraid," because otherwise the conviction was improper. This too

begs the issue of the sufficiency of evidence supporting the conviction. There is nothing in the plain meaning of that statement or any of the others which permits the kind of sinister inferences the panel has drawn from them.

The panel incorrectly read the stalking statute to require proof of both "reasonable fear" on the part of the victim and specific intent to cause the fear. The statute on its face would permit a conviction just where there is intent to cause fear, regardless of whether there was fear or whether the fear was reasonable. This is a critical problem with the statute, which was unaddressed by the panel, particularly because Parker was incapacitated by reason of being in jail. In the absence of either conduct that is defined to be illegal, e.g. firing a gun into a occupied dwelling, or some definable consequence, such as bodily harm, there is nothing that one reliably can look to as external evidence of the required intent. It is unclear whether the panel was attempting to modify the statute to allow it to pass constitutional muster, or whether it just misread the statute.

CONCLUSION

The Panel opinion did not fully examine Parker's appeal and imported facts into the case from outside the statement of facts. It is requested that the Court rehear, en banc, this appeal.